



In the Matter of:

**GENERAL SERVICES
ADMINISTRATION, REGION 3**

ARB Case No. 97-052

DATE: November 21, 1997

**With respect to application of
Section 4(c) of the McNamara-O'Hara
Service Contract Act to Contract
No. GS-03P-95-DWC-0035, Armed Guard
Services, Health Care Financing Administration,
Woodlawn, Maryland**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

DECISION AND ORDER

This case is before the Board on the petition of the General Services Administration, Region 3 (GSA), seeking review of the November 25, 1996 final ruling issued by the Administrator, Wage and Hour Division, pursuant to the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. §351, et seq. (SCA). *See* 29 C.F.R. §§4.189, 8.1(b)(6), 8.7(b) (1996). The GSA challenges the Administrator's ruling that Section 4(c) of the SCA, 41 U.S.C. §353(c) (1994), applies to Contract No. GS-03P-95-DWC-0035 for armed guard services at the Health Care Financing Administration (HCFA) facility in Woodlawn, Maryland. For the reasons set forth below, the final ruling of the Administrator is affirmed.

Motion to Dismiss

As a threshold matter, we address the question of whether this appeal has been properly and timely filed. *See In re Institutional & Environmental Management, Inc., and Transport Workers Union of American, Local 525, AFL-CIO*, Case No. 88-CBV-4, Dep. Sec. Dec.,^{1/} Jan. 11, 1989, slip op. at 3; 29 C.F.R. §§8.7(b), 8.9(a)(1996). On February 5, 1997, the United Union of Security Guards (Union) filed a Motion to Dismiss Appeal, in which it argued that the GSA's

^{1/} The foregoing decision was issued by the Deputy Secretary prior to the establishment of the Board of Service Contract Appeals on July 10, 1992. *See* Secretary's Order 3-92, 57 Fed. Reg. 33,414 (July 28, 1992); 29 C.F.R. §8.0 (1991). For purposes of review of matters arising under the SCA, the Board of Service Contract Appeals was the predecessor to the Administrative Review Board. *See* Secretary's Order 2-96, 61 Fed. Reg. 19978 (May 3, 1996).

petition was not timely filed. January 24, 1997 was the deadline of the sixty-day period provided for seeking review of the Administrator's November 25, 1996 ruling pursuant to 29 C.F.R. §8.7(b). On January 23, 1997, the GSA filed a request for extension of time in which to file its petition for review, which was granted by Board order on January 27, 1997. *See* Notice of Appeal and Order Establishing Briefing Schedule of Jan. 27, 1997. On January 30, 1997, the GSA filed its petition for review. The Union was served a copy of the GSA's petition for review, Petition for Review at Certificate of Service, which the Union received on January 31, Motion to Dismiss Appeal at 1. The Union objects to the extension granted the GSA because the GSA had not served the extension request on the Union, or other interested persons, and the Union thus did not have notice and an opportunity to respond prior to the Board's granting of the request. Motion to Dismiss Appeal at 1-2. The Union emphasizes the importance of the GSA, as a governmental agency, being held by the Board to the same standard as parties from the private sector. *Id.* at 2. The Union's concern that proceedings before this Board be conducted in a fair and even-handed manner is well taken. Our examination of pertinent regulations and relevant procedural principles demonstrates, however, that the GSA's January 23, 1997 extension request was properly granted.

The regulations pertinent to this Board proceeding are found at 29 C.F.R. Part 8, Subparts A, C, D,^{2/} and were promulgated by the Secretary pursuant to the grant of authority provided by Section 4(a) of the SCA, codified at 41 U.S.C. §353(a).^{3/} *See* 49 Fed. Reg. 10636 (Mar. 21, 1984). The Union does correctly note that motions, including requests for extensions of time, and other documents filed in this Board proceeding are required by regulation to be served on "all interested parties."^{4/} 29 C.F.R. §§8.10(d), (e), 8.15(a), (b).^{5/}

^{2/} Subparts A, C and D of Part 8 are pertinent to this appeal of the "final action[]" of the Wage-Hour Administrator" under 29 C.F.R. §8.1(b)(6). *See* 29 C.F.R. Part 8. Subpart B of Part 8 concerns Review of Wage Determinations and is thus not controlling in this case.

^{3/} Section 4(a) of the SCA incorporates Sections 4 and 5 of the Walsh-Healey Act, as amended, 41 U.S.C. §§38, 39, 41 U.S.C. §353(a); *see United States v. Deluxe Cleaners and Laundry, Inc.*, 511 F.2d 926 (4th Cir. 1975). The Secretary is expressly authorized "to prescribe rules and regulations" as he finds necessary to the administration of the statute. 41 U.S.C. §38.

^{4/} As pointed out by the GSA in response to the dismissal motion, the Union erroneously relies upon 29 C.F.R. §7.18, which is found in 29 C.F.R. Part 7, and which pertains to practice before the Board in regard to Federal and Federally assisted construction contracts, Motion to Dismiss Appeal at 1.

^{5/} Section 8.10 provides, in pertinent part:

(d) *Proof of service.* Papers filed with the Board shall contain an acknowledgement of service by the person served or proof of service in the form of a statement of the date and the manner of service

(continued...)

In response to the Union's dismissal motion, the GSA observes that the Union was not identified as a party or an "interested person" by the Administrator's November 25, 1996 final ruling.^{6/} Response to the Motion to Dismiss Appeal at 2; *see* Exh. 17. The Administrator's final ruling is issued in letter form and is not accompanied by a certificate of service. Exh. 17. Nonetheless, the legal representatives for the Union were listed as copy recipients, not only on the Administrator's final ruling but also on previous documents addressed to or generated by the GSA, Exhs. 11, 12, 13, 14, 15, 17, thus indicating that the Union qualified as an interested person for purposes of service under 29 C.F.R. §§8.10(d), (e), 8.15(a). *See* 29 C.F.R. §8.11.

We therefore agree with the Union that the GSA's January 23, 1997 request for extension of time should have been submitted as a motion and served on the Union. The GSA's failure to follow that procedure, or even to submit a copy of the Administrator's final ruling with the extension request, deprived the Board of the information necessary to notify all interested parties of the filing of the appeal, pursuant to 29 C.F.R. §8.11(a). Although the Board's order of January 27, 1997 was served on various other union and trade organizations, the order was not served on the Union or on the successor contractor. *See* Notice of Appeal and Order Establishing Briefing Schedule of Jan. 27, 1997 at Certificate of Service; *cf. In re Institutional & Environmental Management, Inc., supra* (remanding case for rehearing before ALJ under 29

^{5/}(...continued)

(e) *Service upon the Department of Labor and other interested parties.* A copy of all documents filed with the Board shall be served upon . . . and all other interested parties.

29 C.F.R. §8.10(d), (e).

Section 8.15(a) provides, in pertinent part:

Except as otherwise provided in this part, any application for an order or other relief shall be made by motion. Except when made orally before the Board, motions shall be in writing and shall be accompanied by proof of service on all other parties.

Section 8.15(b) provides:

Requests for extension of time as to the filing of papers or oral presentation shall be in the form of a motion under paragraph (a) of this section.

29 C.F.R. §8.15 (1996).

^{6/} Section 8.11(a) directs the Board, following receipt of a petition of review, "to notify the parties known or believed to be interested in the case." 29 C.F.R. §8.11(a); *cf.* 29 C.F.R. §8.2(b) (defining "interested party" to include employees, labor organizations, contractors, industry associations, contracting agencies and "any other party whom the Board finds to have a sufficient interest . . .," for purposes of appeals of wage determinations to the Board under Subpart B of Part 8, Title 29).

C.F.R. Part 6 because successor contractor and employees' union had not received proper notice of hearing).

It is well established that an agency may waive strict compliance with regulations that are directory or procedural, when such waiver does not prejudice the respective interests of the parties involved. *See, e.g., Tipps v. Comm'r*, 74 T.C. 458, 468 (1980). Similarly, an administrative adjudicative agency may relax or modify procedural rules that have been promulgated to promote the orderly adjudication of matters before the agency, when doing so does not impair the respective rights of the parties involved. *National Labor Relations Board v. Monsanto Chemical Co.*, 205 F.2d 763, 764-65 (8th Cir. 1953), *quoted in American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970); *see Safety-Kleen Corp. v. Dresser Industries, Inc.*, 518 F.2d 1399, 1402-03 (C.C.P.A. 1975); *see generally In re Charles Judd*, Case No. SCA-1018, Under Sec. Dec., Oct. 26, 1984, slip op. at 7-10 (quoting *Monsanto Chemical Co.* decision in support of conclusion that Secretary's failure to comply with timeframes provided by statute and regulation for recommending debarment to Comptroller General did not deprive Secretary of jurisdiction to do so). The Board could thus properly waive the service and filing requirements of Sections 8.10(d), (e), and 8.15(a), (b), provided that such waiver did not impinge upon the ability of the respective parties to participate in this appeal.

In regard to the foregoing issue, the Federal Rules of Civil Procedure (FRCP) provide support for the conclusion that the granting of the GSA's January 23, 1997 extension request was consistent with basic tenets of fundamental fairness. As the regulations pertinent to this proceeding do not specifically address the grounds on which an enlargement of time for the filing of a petition for review may be granted, *see* 29 C.F.R. Part 8, Subparts A, C, D, it is appropriate to look to the FRCP for guidance.^{7/} *See In re Cindy Monohan*, Case No. 87-SCA-32, Dep. Sec. Dec. on Recon., Mar. 23, 1992, slip op. at 1-2; *In re Military Sealift Command*, Case No. 86-SCA-OM-1, Sec. Ord. on Recon., Oct. 23, 1991, slip op. at 1;^{8/} *cf. In re Tri-Way Security and Escort Services, Inc.*, BSCA Case No. 92-05, July 31, 1992, slip op. at 3 (in cases involving hearings, the Rules of Practice and Procedure for Administrative Hearings, 29 C.F.R. Part 18, apply but the FRCP is applicable to situations not addressed by the Part 18 regulations, 29 C.F.R. §18.1(a)). Rule 6(b) of the FRCP governs requests for enlargements of time, including requests for enlargements of time in which to file an appeal. Fed.R.Civ.P. 6(b). Rule 6(b) distinguishes between requests for enlargement of time that are submitted prior to the running of a deadline and those requests that are submitted after the deadline has passed. *Id.*; *Lujan v. National Wildlife Federation*, 497 U.S. 871, 894-95 (1990). The former may be granted in the

^{7/} We note that the regulations concerning enforcement proceedings under the SCA, Subpart B of Part 6, Title 29, do provide for enlargements by the Administrative Review Board of the time period in which a party may file a petition for review of a decision issued by an Administrative Law Judge. 29 C.F.R. §6.20. Part 6 concerns enforcement actions only, however, and does not address an appeal from a ruling of the Administrator as is involved in this case. *See* 29 C.F.R. §6.1.

^{8/} The foregoing rulings were issued by the Deputy Secretary and Secretary, respectively, prior to the establishment of the Board of Service Contract Appeals. *See* n.1 *supra*.

discretion of the court, with or without prior notice to other parties to the case, whereas the latter must be presented in a motion, which may be granted by the court only for good cause shown and only if other parties to the case are provided an opportunity to respond. *Id.*; *Plant Economy, Inc. v. Mirror Insulation Co.*, 308 F.2d 275 (3d Cir. 1962); *North Umlerland Mining Co. v. Standard Accident Ins. Co.*, 193 F.2d 951 (9th Cir. 1952). By analogy under Rule 6(b), the GSA's January 23, 1997 extension request, which was filed within the appeal period provided by Section 8.7(b), would qualify for approval at the Board's discretion, without prior notice to the other parties, or interested persons, to the case. We thus conclude that granting GSA's extension request, without providing the other parties or interested persons to this case prior notice or opportunity to respond, was not in conflict with well established principles of fundamental fairness.

We further conclude that our disposition of the GSA's extension request has not impaired the Union's rights to fairly participate in the Board's consideration of the merits of this appeal. The Union's receipt of the GSA's petition for review on January 31, 1997 put the Union on notice regarding the GSA's appeal, thus curing any procedural defect resulting from the lack of service on the Union of the Board's January 27, 1997 order.^{2/} We accordingly conclude that the GSA's January 23, 1997 request for extension of time was properly granted and that this appeal is properly before us.

Factual Background

The material facts pertinent to the Administrator's ruling in this matter are not in dispute. The offices of the HCFA were housed, until May 1995, in several buildings contained within the Social Security Administration (SSA) complex, located in Woodlawn, Maryland. *See* Exh. 2. In May 1995, the HCFA relocated to a new facility that had been constructed in Woodlawn near the SSA complex. *See* Exhs. 5, 6, 7A. For the purpose of procuring guard services for the entire SSA complex in August 1993, the SSA entered into a contract with Watkins Security Agency, Inc., (Watkins) for a base year, to run from September 5, 1993 through September 4, 1994, followed by two option periods of one year and six months, respectively. Exhs. 1, 1A. In that contract, No. 600-93-07326, the SSA segregated the costs of the guard services to be provided for the HCFA offices at the SSA complex from the costs of guard services for the remainder of the SSA complex. *Id.* The SSA also reserved the option of terminating the HCFA portion of the contract, either at the beginning of the contract period or thereafter, on a monthly basis. Exh. 1 at 3; Exh. 1A at 39.

On August 8, 1994, Watkins entered a collective bargaining agreement (CBA) with the Union. Exh. 2. That agreement provided that it would be in force until May 31, 1997. *Id.* The SSA did exercise its option to continue the contract with Watkins for guard services for the SSA

^{2/} On March 28, 1997, the Union filed its brief opposing the petition for review; the arguments advanced by the Union in that brief have been given careful consideration in our review of the petition filed by the GSA.

complex, including offices then occupied by the HCFA, through the base year and into the first option period, which ran from September 5, 1994 through September 4, 1995. Exh. 1A. On July 27, 1995 the HCFA advised the SSA that relocation to its newly constructed offices was imminent and that it would no longer be occupying offices in the SSA complex in September 1995. Exh. 7A. Accordingly, with regard to the second option period, September 5, 1995 to April 4, 1996, the SSA exercised its option to continue the contract for the remainder of the SSA complex but not for the part of the contract covering services for the space formerly occupied by the HCFA. *See id.*

Although the SSA had been responsible for contracting for services at the SSA complex, the GSA was responsible for contracting for services at the new HCFA facility. Exh. 15; *compare* Exh. 1 *with* Exhs. 3, 6. In order to provide guard services for the new HCFA facility following completion of its construction but prior to its occupancy by HCFA staff, the GSA awarded a contract to run from November 1994 through May 1995, Contract No. GS-03P-94-DWC-0048. *See* Exh. 3. The GSA also solicited bids for a long term contract for armed guard services at the new HCFA facility, under Contract No. GS-03P-95-DWC-0002, to be effective May 1, 1995. Exh. 5. The contract was initially awarded to Scotlandyard, which defaulted. In response to the default, the GSA awarded an emergency contract for guard services, which provided for a base period of one month, with two one month option periods. Exh. 7 (Contract No. GS-03P-95-DWC-0031). The long term contract, Contract No. GS-03P-95-DWC-0035, which provided for one base year and four one year option periods, was subsequently awarded to Master Security, Inc. (Master). *See* Exhs. 5, 6, 8.^{10/}

On September 7, 1995, counsel for the Union, acting as representative for the Union members working at the new HCFA facility, requested that GSA obtain a corrected wage determination for the Master contract based on the CBA entered into between Watkins and the Union under SSA Contract No. 600-93-07326, and the mandate of Section 4(c) of the SCA. Exh. 9. Correspondence between the GSA contracting officer and the Wage and Hour Division regarding whether Section 4(c) of the SCA was applicable to the Master contract at the new HCFA facility followed.^{11/}

The initial response from the Wage and Hour Division concluded that the "first time contract" at the new HCFA facility was not a successor contract within the meaning of Section 4(c) of the SCA. Exh. 10. Based on receipt of further information pertinent to the Section 4(c) issue, the Wage and Hour Division conducted an investigation and determined that the Master contract was a successor contract and therefore subject to Section 4(c). Exh. 12. The GSA was

^{10/} The contract that is in the record as Exhibit 5 represents the substance of the contract that was awarded to Scotlandyard, as Contract No. GS-03P-95-DWC-0002, and the contract that was later awarded to Master, and designated as Contract No. GS-03P-95-DWC-0035. Pet. for Rev. at 7.

^{11/} On January 30, 1996, Master entered into a CBA with the Union, the terms of which stated that it would be in effect for the period from September 1, 1995 until May 31, 1996. Exh. 8.

advised, in April and June 1996, to retroactively apply the Section 4(c) ruling to the Master contract, but refused to do so. Exhs. 12-16.

On November 25, 1996, the Administrator issued a final ruling that the collectively bargained wage rates under the CBA between Watkins and the Union at the SSA complex were applicable to Contract No. GS-03P-95-DWC-0035 for guard services at the new HCFA facility that had been entered into by GSA with Master for the period of September 1, 1995 through August 31, 1996. Exh. 17. The Administrator specifically concluded that guard services for the HCFA offices formerly located at the SSA complex constituted "identifiable contract work requirements" within the meaning of 29 C.F.R. §4.163(g), thus invoking coverage under Section 4(c) of the SCA. *Id.* On January 30, 1997, the GSA petitioned for review of the Administrator's final ruling.

Discussion

Section 4(c) of the SCA mandates, *inter alia*, that a successor contractor, operating in the same locality as the predecessor contractor and furnishing substantially the same services, pay its employees under the successor contract no less than the wages and fringe benefits that were paid to employees under the predecessor contract. 41 U.S.C. §353(c); *see* 29 C.F.R. §§4.1b, 4.163 (1995). The Administrator concluded that the foregoing conditions had been met and thus that the GSA contract with Master for guard services for the new HCFA facility in Woodlawn, Maryland was subject to the wage and fringe benefit provisions of the CBA in effect between Watkins and the Union during the predecessor contract term of September 5, 1994 through September 4, 1995. The thrust of the GSA's challenge to the Administrator's decision is that the contract for guard services at the SSA complex that was in force after HCFA's September 1995 move to the new HCFA facility constitutes the only successor contract to the September 1994/95 predecessor contract between the SSA and Watkins. For the reasons that follow, we agree with the Administrator that the contract reconfiguration provisions of Section 4.163(g) are applicable to Contract No. GS-03P-95-DWC-0035.

Section 4.163 provides detailed guidelines for application of the Section 4(c) mandate for the incorporation of CBA provisions into successor contracts. 29 C.F.R. §4.163; *see, e.g., In re Clear Air Force Base, Alaska*, BSCA Case No. 94-07, Oct. 31, 1994. Section 4.163(g) states that "specific contract requirements from one contract may be broken out and placed in a new contract . . ." without negating the protection afforded employees under the new contract as a successor contract under Section 4(c). 29 C.F.R. §4.163(g). Section 4.163(g) also provides that "the predecessor contractor's collectively bargained rates follow identifiable contract work requirements into new or consolidated contracts, provided that the new or consolidated contract is for services which were furnished in the same locality under the predecessor contract." *Id.* In the instant case, the "specific contract requirements" that were broken out and placed in a new contract are for the provision of armed guard services for the offices and staff of the HCFA. *See* Exhs. 1, 1A. As previously noted, SSA Contract No. 600-93-07326 for guard services at the SSA complex for the period September 5, 1994 through September 4, 1995 separately identified the costs for guard services for the HCFA offices there. *Id.* Comparison of the aforesaid SSA

contract for armed guard services at the HCFA offices within the SSA complex with GSA Contract No. GS-03P-95-DWC-0035, for armed guard services for the new HCFA facility, clearly demonstrates that both contracts concern the same "identifiable contract work requirements," with a change in little more than the address of the office buildings occupied by the HCFA. *See generally In re Harry A. Stroh Associates, Inc., and Amer. Federation of Gov't Employees, AFL-CIO, Local 2263*, Case No. 87-CBV-2, Dep. Sec. Dec., Apr. 24, 1991 (services rendered by personnel at Air Force base hospital not "of a character similar" to those rendered in the locality for purposes of Section 4(c)); *In re Professional Helicopter Pilots Ass'n*, Case No. 89-SCA-WD-4, Dep. Sec. Dec., Jan. 30, 1991 (services rendered under two contracts not "substantially the same" and therefore not covered by Section 4(c)).

Specifically, the SSA and GSA contracts each list the following responsibilities as "typical duties" to be performed by the uniformed guards: enforce a personal identification and package inspection system at the entrance control post; patrol the facility in accordance with established routes and schedules; direct pedestrian and vehicular traffic; receive, issue and account for all facility keys; maintain and operate facility fire alarm, intrusion detection and other protective systems; perform minor operations and/or record data in connection with facility utility systems; observe building occupants and visitors for compliance with posted rules and regulations;^{12/} accept, provide receipt for and store found articles; maintain law and order within assigned area; discover and detain individuals attempting to gain unauthorized access; report potentially hazardous conditions and items in need of repair; obtain professional assistance in the event of injury or illness; perform duties attendant to ensuring that the United States flag, and others as authorized, are flown as required; turn off unnecessary lights, ensure that doors and windows are closed, check repositories and safes; prepare reports and records regarding accidents, fires, bomb threats, unusual incidents and unlawful acts; perform such other duties as required in the event of civil disturbances, attempts to commit espionage, sabotage or other criminal acts adversely affecting safety and security at the facility; respond to emergency conditions requiring immediate attention by diverting guards from normal assigned duties and notifying agency representative immediately. Exh. 1 at 9-11; Exh. 5 at 0009-0011. Although the GSA contract includes the use of computerized HCFA badge and other computerized identification systems as an additional guard duty, Exh. 5 at 0011, this distinction is minor and does not undermine the conclusion that the work requirements for the SSA contract and the GSA contract are substantially similar. *Cf. Professional Helicopter Pilots Ass'n*, slip op. at 5-6 (discussing "significant differences that transcend the mere 'introduction of new tools'" and thereby undermine the conclusion that work is substantially similar). Furthermore, the two contracts specify virtually identical education and experience qualifications for guard personnel. Exh. 1 at 13; Exh. 5 at 0019-20. Finally, both contracts specify that the guards' duties be

^{12/} The GSA contract for the HCFA facility details the corrective actions to be taken when occupants or visitors are observed violating facility rules and regulations; actions to be taken are implied by the corresponding SSA contract item, when read in conjunction with the duties to maintain law and order in the assigned area and to prepare reports regarding unusual incidents and unlawful acts. Exh. 1 at 10, 11; Exh. 5 at 0010.

performed from comparable work posts during similar hours and days of the week. *Compare* Exh. 1A, attachment J-1 at 4-5 *with* Exh. 5 at 0095-0097. We thus conclude that GSA Contract No. GS-03P-95-DWC-0035 covers services for the new HCFA facility that are substantially similar to those provided the HCFA offices in the SSA complex under SSA Contract No. 600-93-07326.

There is also no question that the guard services rendered under the aforesaid GSA contract were performed in the same locality as under the SSA contract. Both work sites are located in Woodlawn, Maryland. *See* Exhs. 1B, 4, 5. The wage determinations that are in evidence for the two work sites indicate that the pertinent locality includes, at a minimum, Baltimore County, in which Woodlawn, Maryland is located.^{13/} Exhs. 1B, 4, 6; *see* 29 C.F.R. §4.54(a); *cf.* *C & H Reforesters, Inc.*, 88-3 B.C.A. (CCH) ¶21,067, 1988 AGBCA LEXIS 27 (1988) (designated locality covered all counties in state); *Electra-Mechanical of America, Inc.*, 83-2 B.C.A. (CCH) ¶16,806, 1983 GSBCA LEXIS 183 (1983) (designated locality covered city in which work site was located); *C & S Service Corp.*, 76-1 B.C.A. (CCH) ¶11,889, 1976 ASBCA LEXIS 113 (1976) (designated locality covered county in which work site was located); *see generally In re Big Boy Facilities, Inc. and the National Maritime Union*, Case No. 88-CBV-7, Dep. Sec. Dec., Jan. 3, 1989, slip op. at 15-17 (discussing "locality" concept under the SCA). Although a self-contained facility may constitute a locality separate from the surrounding geographic area in certain circumstances, *see A & C Bldg. and Indust. Maint. Corp.*, 82-1 B.C.A. (CCH) ¶15,634, 1982 GSBCA LEXIS 96 (1982) (Air Force base designated as a separate locality), there has been no showing that such circumstances exist in this case. We therefore agree with the Administrator that the statutory and regulatory requirement that the services be performed in the same locality has been met.

We reject the GSA's contention that the temporary contracts that the GSA entered into for guard services at the new HCFA facility prior to that facility's occupation in September 1995 preclude Section 4(c) coverage of the Master contract. *See* Pet. for Rev. at 10-13. Section 4.163(h) addresses various circumstances that may result in the interruption of contract services but which will not undermine the predecessor/successor contract relationship. 29 C.F.R. §4.163(h); *see In re Fort Hood Barbers Ass'n*, ARB Case No. 96-181, Nov. 12, 1996, slip op. at 4 n.3. As previously described, the GSA entered into short term and emergency contracts for limited guard services during the interim period -- November 1994 through August 1995 -- between the completion of construction on the new HCFA facility and the occupation of that site by HCFA staff. *See* Exhs. 3, 5, 6, 7, 8. Factors that played a role in the instant case, *viz.*, the change in the contracting agency and the default of one of the contractors, are among those circumstances specified by Section 4.163(h) as exigencies that could result in the interruption of contract services but which would not undermine the predecessor/successor contract relationship under Section 4(c). In addition, Section 4.163(h) refers to the temporary closing of

^{13/} The Wage Determination dated April 6, 1993, covers Baltimore County; the Wage Determination dated December 23, 1993, covers, in addition to Baltimore County, Anne Arundel, Howard, Carroll, Harford Counties and Baltimore City. Exhs. 1B, 4, 6; *see* 29 C.F.R. §4.54(a).

a government facility for renovation, an eventuality in the operation and maintenance of office buildings that is similar to the closing of the HCFA offices in the SSA complex and the relocation to the new HCFA facility that is involved here. We therefore conclude that the short term contracts entered into by the GSA during the November 1994 through August 1995 period qualify as interim contracts of the type that, pursuant to Section 4.163(h), do not undermine the predecessor/successor contract relationship of the full term contracts here involved. *See* 29 C.F.R. §4.163(h).^{14/}

Similarly without merit is the GSA's alternative contention that, if a predecessor/successor contract relationship does exist for purposes of Section 4(c) coverage, the CBA in effect under the predecessor contract is binding on the successor contract for a period of one month only. The GSA bases this argument on the provision in the predecessor contract between the SSA and Watkins that reserved to the SSA the right to exercise its option to continue the contract for guard services for the HCFA offices at the SSA complex on a monthly basis, during the September 5, 1994 through September 4, 1995 period. Pet. for Rev. at 16-18. That monthly option provision, the GSA urges, requires that the predecessor contract be considered to be a monthly, rather than a yearly contract and, pursuant to the Board's decision in *In re International Union of Operating Engineers and Local 387*, BSCA Case No. 92-23, Jan. 27, 1993, to be binding on the successor contract for a period of one month only. *Id.* In further support of this argument, the GSA quotes text from the regulations found at Sections 4.143(b) and 4.145(a).^{15/} The Administrator urges that adoption of the GSA's reading of the *Operating*

^{14/} Section 4.163(h) summarizes the restrictions on the applicability of Section 4(c) thus:

Other than the requirement that substantially the same services be furnished, the requirement for arm's-length negotiations and the provision for variance hearings, the Act does not impose any other restrictions on the application of section 4(c).

29 C.F.R. §4.163(h).

^{15/} The GSA quotes from Section 4.145(a), as follows:

In other cases a service contract, entered into for a specified term by a Government agency may contain a provision such as an option clause under which the agency may unilaterally extend the contract for a period of the same length or other stipulated period. Since the exercise of the option results in the rendition of services for a new or different period not included in the term for which the Government is obligated to pay under the original contract in the absence of such action to extend it, the contract for the additional period is a wholly new contract with respect to application of the Act's provisions and the regulations thereunder (see Section 4.143(b)).

The GSA quotes from Section 4.143(b), as follows:

Also, whenever the term of an existing contract is extended pursuant to an option
(continued...)

Engineers decision would not serve the purposes of the SCA. Statement of the Adm'r in Opp. to Pet. for Rev. at 18-19. The Administrator also notes that the SSA did not exercise its option to terminate the predecessor contract with Watkins during the September 1994/95 contract year. *Id.*

We initially note that we must read the regulatory language that is relied on by the GSA within the context of the regulations as a whole and in a manner that is consistent with the purposes of the SCA.^{16/} See *Colorado Dep't of Labor and Emp't v. United States Dep't of Labor*, 875 F.2d 791, 798 (10th Cir. 1989)(construing regulations under the Comprehensive Employment and Training Act, 29 U.S.C. §801 *et seq.*); see also 2A Norman J. Singer, *Sutherland, Statutes and Statutory Construction*, §46.06 at 119-20 (5th ed. 1992)(provisions must be construed in a manner that gives effect to all); see generally *Amer. Federation of Labor and Congress of Industrial Orgs. v. Donovan*, 757 F.2d 330 (D.C. Cir. 1985)(examining validity of regulations promulgated under the SCA); *Clear Air Force Base*, slip op. at 4-6 (construing 29 C.F.R. §4.163(a)). We cannot agree with the GSA's contention that Sections 4.143 and 4.145, as construed in *Operating Engineers*, require that the predecessor contract between the SSA and Watkins be deemed a monthly contract. Rather, we conclude that the monthly option provision included in the SSA predecessor contract must be considered to be another of the exigencies covered by Section 4.163(h).

Several factors militate against a reading of Sections 4.143 and 4.145, and the *Operating Engineers* decision, as sanctioning the result advocated by the GSA in this case. In the *Operating Engineers* decision, the Board agreed with the Administrator that service contracts that provide for a base year contract with additional one year option periods should be considered to be separate one year contracts for purposes of Section 4(c). In concluding that the Administrator's interpretation of "contract" under the SCA was reasonable, the Board reviewed the text of Section 4(c) and the regulatory provisions found at 29 C.F.R. §§4.143(b) and 4.145(a), and noted that, "as a matter of administrative policy, multi-year service contracts with a basic year and option periods have been consistently treated by the Wage and Hour Division as separate contracts since 1968." *Operating Engineers*, slip op. at 5; see also *Clear Air Force Base*, slip op. at 5 (observing deference due agency in interpretation of its own regulations). The foregoing reasoning focuses on option periods of one year in duration, for two primary reasons.

^{15/}(...continued)

clause or otherwise, . . . the contract extension is considered to be a new contract for the purpose of the application of the Act's provisions.

Pet. for Rev. at 16-17.

^{16/} As has been frequently noted by the Board, it is axiomatic that we are bound by the implementing regulations promulgated by the Secretary. See, e.g., *In re Fort Hood Barbers Ass'n*, ARB Case No. 96-181, Nov. 12, 1996, slip op. at 3 n.2; see also 29 C.F.R. §8.1(b).

First, as Section 4.145(a) explains, multi-year contracts that are subject to appropriation of funds by Congress must be considered to be a series of yearly contracts in view of the contingent nature of their continued funding. 29 C.F.R. §4.145(a). In addition, as cited in Section 4.145(b) and discussed in the Board's *Fort Hood Barbers* decision, Section 4(d) of the Act, 41 U.S.C. §353(d), requires that wage determinations be periodically adjusted at intervals of no less than two years. See 29 C.F.R. §4.145(b); *Fort Hood Barbers*, slip op. at 3-4. Comments made by the Administrator in the course of revising Section 4.145(a) in 1983 state that "[t]his section is intended to cover only those contracts for terms in excess of one year . . ." 48 Fed. Reg. 49736 (Oct. 27, 1983). At that time, the Administrator also noted that the GSA had commented that the regulation as previously drafted was unclear and "could be interpreted to require incorporating a new (revised) wage determination at the beginning of the new fiscal year, even though the contract had been in effect only a few months." *Id.* The comments of the GSA on that occasion clearly anticipate the impracticality of the interpretation of the "wholly new contract" language of Section 4.145 that the GSA is now advocating. All of the foregoing indicate that the option periods contemplated by Sections 4.143 and 4.145 are for one year's duration, consistent with the primary purpose of those regulations to ensure that updated wage determinations are incorporated into multi-year contracts. See 61 Fed. Reg. 19770 (May 2, 1996) (Proposed rules, 29 C.F.R. Part 4; commenting that Federal agencies typically award contracts for one year with options for additional years and that option periods are deemed to be new contracts "for wage determination purposes and must include new or updated wage determinations (see 29 C.F.R. 4.145).").

By reserving the right to terminate the contract for guard services for the HCFA offices on a monthly basis, the SSA served the interests of efficiency and fairness by placing Watkins on notice that the HCFA portion of the contract was subject to termination at any time during the contract year. The monthly option provision in the SSA predecessor contract thus served the function of facilitating the transition from one full term contract to another that is contemplated by Section 4.163(h). In construing these regulations, it is necessary to keep in mind that Section 4(c) attempts to strike a balance between the protection of prevailing labor standards and the safeguarding of other legitimate Federal government interests. See *Trinity Services, Inc. v. Marshall*, 595 F.2d 1250, 1256-57 (D.C. Cir. 1978)(quoting from legislative history of Section 4(c), S. Rep. 1131, 92d Cong., 2d Sess. 4-5, reprinted in 1972 U.S. Code Cong. & Ad. News 3537); see also 41 U.S.C. §353(b) (authorizing the Secretary to establish exemptions from all provisions of SCA except Section 10, 41 U.S.C. §358). To hold that the predecessor contract was converted from a yearly into a monthly contract for purposes of Section 4(c) coverage based on the SSA's having efficiently and fairly facilitated the transition from one full term contract to another would serve neither of these objectives. We therefore reject the GSA's argument that the successor contractor is bound for a period of one month only by the predecessor contract.

Finally, the GSA's reliance on Section 4.55(a)(1) in support of its argument that the Administrator cannot now require application of Section 4(c) to the successor contract between the GSA and Master is misplaced. Pet. for Rev. at 18-19. Although Section 4.55(a)(1) limits the period of time in which a party may request reconsideration of a wage determination by the

Administrator, 29 C.F.R. §4.55(a)(1),^{17/} its provisions are not controlling here. As urged by the Administrator, Section 4(c) of the Act imposes a direct statutory obligation and is self-executing. *See* 29 C.F.R. §4.163(b); *In re Houston Building Services, Inc.*, ARB Case No. 95-041A, Aug. 21, 1996, slip op. at 5. As expressly provided in Section 4.163(b), it is unnecessary for Section 4(c) coverage to be reflected in the pertinent wage determination. Rather, the Administrator's final ruling regarding the applicability of Section 4(c) is an action independent of the wage determination issued for the GSA contract here involved, and that action is before the Board pursuant to 29 C.F.R. §§8.1(a)(6), 8.7(b).

For the foregoing reasons, the Petition for Review is **DENIED**.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member

^{17/} The regulation at 29 C.F.R. §4.55 was redesignated as Section 4.56 in 1996. *See* 61 Fed. Reg. 68664 (Dec. 30, 1996).